

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

CRIMINAL NO. 12-cr-20030

vs.

HON. NANCY EDMUNDS

D-1 JEFFREY BEASLEY,
D-2 ROY DIXON,
D-4 PAUL STEWART,
and
D-5 RONALD ZAJAC,

Defendants.

TRIAL BRIEF

This trial brief is provided to the Court in anticipation of issues that may arise during the trial. Several issues have been the subject of motions in limine and will not be addressed in this brief.

<u>Topic</u>	<u>Page</u>
Presentation of Proofs.....	2
Impeachment by Prior Bad Acts – Fed. R. Evid. 608.....	4
Arguments About Failure of Government to Call Witnesses.....	5
Charts and Visual Aids.....	8
State of Mind of Extortion Victim.....	10
Impeachment on a Collateral Matter.....	11
Hostile Witness	12

Statements of Co-Conspirators.....	15
The Defendants Cannot Use Rule 801(d)(2)(E) to Admit Hearsay	18
Statements Made in Furtherance of the Conspiracy.....	18
Hearsay Exceptions – Fed. R. Evid. 803(1) & (3)	20
Use of Transcripts By the Jury During Deliberations.....	22
The Court Can Instruct the Jury on State Statutes.....	23

Presentation of Proofs

In most cases, the government will present evidence sequentially based on particular pension investments pending before one or both of Detroit's two pension systems. To the best of its ability, the government will notify defense counsel in advance as to the particular pension investments and witnesses about which it will present evidence. However, because many of the government's witnesses are out of state, witness management may be a problem. There may be a need to be flexible with some of the investment or transactions that have only one witness.

Some witnesses will have information about different parts of the case. It may be necessary to call one or more of these witnesses multiple times. It is the intention of the government to limit this as much as possible. Furthermore, some of the government witnesses may be defense witnesses for parts of the case other than for which he or she is called by the government. The parties will seek to resolve the presentation of this evidence to accommodate the witnesses, the parties, and to avoid

jury confusion. As the need arises, the Court may be asked to provide guidance pursuant to Fed. R. Evid. 611.

Set forth below is a chart identifying the charges and defendants in the Seventh Superseding Indictment.

Count	Charge	Defendant(s)
One	Honest Services Fraud Conspiracy 18 U.S.C. § 1349	Beasley, Dixon, Stewart, Zajac
Two	Extortion, 18 U.S.C. § 1951 (1/26/07 Birthday Party)	Beasley
Three	Extortion, 18 U.S.C. § 1951 (ICG)	Beasley
Four	Extortion, 18 U.S.C. § 1951 (Syncom)	Beasley
Five	Extortion, 18 U.S.C. § 1951 (Mayfield)	Beasley
Six	Attempted Extortion, 18 U.S.C. § 1951 (Townsend)	Beasley
Seven	Acceptance of Bribe, 18 U.S.C. § 666 (Turks & Caicos)	Beasley
Eight	Giving of Bribe, 18 U.S.C. § 666 (Turks & Caicos)	Dixon
Nine	Giving of Bribe, 18 U.S.C. § 666 (Stanton)	Dixon
Ten	Wire Fraud Conspiracy 18 U.S.C. § 1349 (Onyx Capital Advisors)	Dixon
Eleven	Wire Fraud 18 U.S.C. § 1343 (Fullen Letter)	Dixon
Twelve	Wire Fraud 18 U.S.C. § 1343 (Construction Companies)	Dixon
Thirteen	Structuring 31 U.S.C. § 5324(a)(3)	Dixon

Impeachment by Prior Bad Acts – Fed. R. Evid. 608

The government anticipates calling several witnesses for whom impeachment information has been provided to defense counsel. Some of those witnesses have prior investigative files or other “bad acts” that defense counsel may attempt to delve into improperly during cross-examination. The Court should prohibit them from doing so. Federal Rule of Evidence 608(b) limits impeachment by prior bad acts to cross-examination about a witness’s character for truthfulness. *See Fed.R.Evid. 608(b)*. Thus, Rule 608(b) forbids defense counsel from impeaching a witness with extrinsic evidence regarding credibility. *Fed.R.Evid. 608(b); United States v. Frost*, 914 F.2d 756, 767 (6th Cir. 1990).

In this case, defense counsel may attempt to ask government witnesses about the fact that some of them were the subject of prior investigations, which concluded without prosecution or a conviction. But such questions are impermissible under Rule 608(b). Although defense counsel may ask the witness if he committed a prior bad act that pertains to his truthfulness, defense counsel may not ask about a prior federal investigation to bootstrap the credibility of those allegations. As the Eighth Circuit has explained, “when the previous allegations of misconduct leveled against a witness resulted in no sanctions or sanctions completely unrelated to the witness’ character for truthfulness, the danger is great that a jury will infer more from the previous investigation than is fairly inferable.”

United States v. Alston, 626 F.3d 397, 405 (8th Cir. 2010); *see also United States v. Novaton*, 271 F.3d 968, 1005-07 (11th Cir. 2001) (holding that past allegations or investigations were not admissible without a conviction, because they did not speak to the truthfulness of a witness); *United States v. Cracium*, 1990 WL 54132, *3 (6th Cir. 1990) (“Unless the actions are probative of truthfulness, they must result in conviction before special treatment is given to felonious acts under section 608(b) . . . Untruthful character is not established upon a mere showing that the witness acted immorally or violated the law.”).

Even if they could satisfy Rule 608(b), defense counsel’s questions would still be impermissible under Rule 403. Under Rule 403, the Court may exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, wasting time, or needless presentation of cumulative evidence. Fed. R. Evid. 403. Because defense counsel’s questions would create confusion and unfair prejudice, this Court should exclude them. *See United States v. Beltran-Garcia*, 338 F. App’x 765, 772 (10th Cir. 2009) (approving the district court’s exclusion of evidence of a testifying officer’s misconduct because of risk of confusion and prejudice).

Arguments About Failure of Government to Call Witnesses

The government does not intend to call every witness that has knowledge about a particular deal, relationship, or relevant fact. One or more of the defendants may attempt to suggest that the government did not present this testimony because it

would have been unfavorable to the government's case. If that argument, or a similar one, is advanced, the government is entitled to respond by arguing that the defendants had a right to call these witnesses also.

The right of the government to make such a response was recognized in *United States v. Clark*, 982 F.2d 965 (6th Cir. 1993), which held that the government could inform the jury that the defendant had the right to call an ATF agent, who, defendant suggested to the jury, was not called as a witness by the government because he would not corroborate the testimony of another agent. In *United States v. Brown*, 66 F.3d 124 (6th Cir. 1995), the government, in rebuttal argument, commented on the defendant's failure to call a handwriting expert. This was found to be a proper response to the defense argument about the government's not calling such a witness.

The government should not be disarmed from using reasonable advocacy weapons to meet challenges by a criminal defendant so long as the government does not imply that the defendant has some type of burden to prove his innocence or comment on the defendant's failure to testify. For example, in *United States v. Gotchis*, 803 F.2d 74 (2nd Cir. 1986), a drug distribution case, the government was permitted to respond to a defense theory that the defendant was a user and not a dealer by pointing out evidence that the defendant could have produced, but did not, to support such a theory. As stated in *United States v. Mares*, 940 F.2d 455, 461 (9th Cir. 1991),

The prosecutor may comment on the defendant's failure to present exculpatory evidence, provided that the comments do not call attention to the defendant's own failure to testify. And we have held that a "comment on the failure of the defense as opposed to the defendant to counter or explain the testimony presented is not an infringement of the defendant's Fifth Amendment privilege." (Citations omitted.)

Id.; see also *United States v. Cabrerra*, 201 F.3d 1243, 1250 (9th Cir. 2000) ("A prosecutor's comment on a defendant's failure to call a witness does not shift the burden of proof, and is therefore permissible, so long as the prosecutor does not violate the defendant's Fifth Amendment rights by commenting on the defendant's failure to testify.").

In *United States v. Ursery*, 109 F.3d 1129 (6th Cir. 1997), the defendant was charged with growing marijuana on land near his house. Defense argued that the government had not presented testimony of anyone who observed the defendant tending the marijuana plants and the government's investigation was incomplete. In rebuttal, the government stated, "Would anybody else have been bold enough to plant those marijuana plants so close to the defendant's property? It's just not believable that somebody else could have planted that marijuana in the summer of 1992 and the defendant never saw the planter, never saw anybody there, nothing." Recognizing that this may have been interpreted as an improper comment on the defendant's failure to testify, the Court nevertheless stated that it could be viewed in another, permissible, light:

It is plausible that the prosecutor's statement was intended to rebut defendant's argument that anybody could have planted the marijuana

by showing that if someone else had planted it, someone on defendant's property would have seen that person tending the marijuana in the field next to defendant's home. Yet, no evidence of such sightings was presented to the jury. In this light, we do not consider the prosecutor's remark as a deliberate attempt to prejudice the jury on the basis of defendant's failure to testify, but rather an attempt to comment on defendant's failure to support his theory of the case.

Id. at 1135.

Depending on the arguments presented by the defendants in this case, the government should be allowed to respond within the bounds established in the authority cited above.

Charts and Visual Aids

The permissible use of summary charts was discussed in *United States v. Bray*, 139 F.3d 1104 (6th Cir. 1998), in which the Court held that summary charts, admitted pursuant to Fed. R. Evid. 1006, are substantive evidence, and that they can go to the jury during its deliberation. Furthermore, the material on which the charts are based need not be admitted as evidence so long as the opposing party has had the opportunity to examine and copy the writings, recordings, or photographs. The Court outlined the preconditions for admissibility of summary charts:

1.) “[T]he documents (or recordings or photographs) must be so ‘voluminous’ that they ‘cannot conveniently be examined in court’ by the trier of fact. That is, the documents must be sufficiently numerous as to make comprehension ‘difficult and . . . inconvenient.’ *United States v. Seelig*, 622 F.2d 207, 214 (6th Cir. 1980); see *Martin v. Funtime, Inc.*, 963 F.2d 110, 115 (6th Cir. 1992). On the other hand, it is not necessary that the documents be *so* voluminous as to be ‘literally impossible to examine. *United States v. Scales*, 594 F.2d 558, 562 (6th Cir. 1979).”

2.) “[T]he proponent of the summary must also have made the documents ‘available for examination or copying, or both, by other parties at [a] reasonable time and place.’ Fed.R.Evid. 1006; *see Scales*, 594 F.2d at 562.”

3.) The material on which the charts are based must be admissible.

4.) The charts “must be accurate and non-prejudicial.” *Gomez v. Great Lakes Steel Div., Nat'l Steel Corp.*, 803 F.2d 250, 257 (6th Cir. 1986). “This means first that the information on the document summarizes the information contained in the underlying documents accurately, correctly, and in a non-misleading manner. Nothing should be lost in the translation. It also means, with respect to summaries admitted in lieu of the underlying documents, that the information on the summary is not embellished by or annotated with the conclusions of or inferences drawn by the proponent, whether in the form of labels, captions, highlighting techniques, or otherwise.”

5.) A proper foundation must me laid.

Id. at 1109-10.

Because summaries admitted pursuant to the above conditions are substantive evidence, it is inappropriate to give the jury a limiting instruction regarding their use. *Id.* at 1111. This type of evidence is no different in its use by the jury than testimonial evidence or other exhibits.

In presenting its case, a party is permitted to use visual aids, such as organizational charts or time lines, to explain its theory to the jury. Unlike summary charts, admitted pursuant to Rule 1006, these visual aids are not evidence and a limiting instruction is appropriate. *Bray*, 139 F.3d at 1111; *United States v.*

Gomez v. Great Lakes Steel Div., Nat'l Steel Corp., 803 F.2d 250, 257-58 (6th Cir. 1986).

Although these visual aids are typically used in closing argument, they may also be used during opening statements. In *United States v. Burns*, 298 F.3d 523 (6th Cir. 2002), the Sixth Circuit endorsed the use of a Power Point presentation during opening statement, with the caution that it not contain prejudicial or misleading representations. In *United States v. Rubino*, 431 F.2d 284, 289-90 (6th Cir. 1970), the Court held that the government was properly permitted to use charts in opening statement to assist the jury in understanding the evidence.

In *United States v. Bray*, *supra*, the Court recognized a third type of visual aid, which is a hybrid of Rule 1006 summaries and pedagogical devices. These secondary-evidence summaries, so long as they “accurately and reliably summarize complex or difficult evidence that is received in the case,” *id.* at 1112, are admissible to “materially assist the jurors in better understanding the evidence.” *Id.* Once admitted, the jurors should be instructed that the summaries are not independent evidence and are only as valid and reliable as the admitted evidence on which they are predicated.

State of Mind of Extortion Victim

The state of mind of a victim in a Hobbs Act prosecution is admissible. As stated in *United States v. Collins*, 78 F.3d 1021, 1036 (6th Cir. 1996), “[i]n a prosecution based upon extortion through fear of economic loss, the state of mind of

the victim of extortion is highly relevant.” State of mind testimony is also relevant in a Hobbs Act prosecution for obtaining property under color of official right. *United States v. Dozier*, 672 F.2d 531 (5th Cir. 1982). In that case, the court correctly permitted “government witnesses to give their reasons for having paid, or refrained from paying, the solicited funds.” *Id.* at 542 (emphasis added).

Impeachment on a Collateral Matter

It is possible that defense counsel may attempt to impeach the testimony of one or more of the government’s witnesses through the attempted presentation of extrinsic evidence about collateral issues. Pursuant to Rule 608(b), such attempts are not permissible:

It is well established that a party may not present extrinsic evidence to impeach a witness by contradiction on a collateral matter. . . . Thus, it is often said that when a witness testifies to a collateral matter, the examiner “must take [the] answer,” i.e., the examiner may not disprove it by extrinsic evidence. A matter is considered collateral if “the matter itself is not relevant in the litigation to establish a fact of consequence, i.e., not relevant for a purpose other than mere contradiction of the in-court testimony of the witness.” Stated another way, extrinsic evidence to disprove a fact testified to by a witness is admissible when it satisfies the Rule 403 balancing test and is not barred by any other rule of evidence.

United States v. Beauchamp, 986 F.2d 1, 3 (1st Cir. 1993) (citations omitted). The determination of whether or not a matter is collateral falls within the discretion of the trial court. *United States v. Kozinski*, 16 F.3d 795, 806 (7th Cir. 1994). In the *Kozinski* case, the trial court did not permit defendants to adduce extrinsic evidence that contradicted the testimony of government witnesses on specific facts. Because

those facts were collateral, this testimony was properly prohibited. As stated by the court, “The proffered testimony has no purpose other than to buttress a claim that the witness was lying. Merely attempting to prove that a witness is lying is not a proper purpose of impeachment by contradiction. The district court, therefore, committed no error in excluding the testimony.” *Id.* at 807 (citations omitted).

Hostile Witness

Fed. R. Evid. 611(c) states that “[l]eading questions should not be used on direct examination except as necessary to develop the witness’s testimony. Ordinarily, the court should allow leading questions: (1) on cross-examination; and (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.” This rule permits leading questions as long as the witness fits within one of the enumerated categories.

Generally, “[b]efore a party is allowed to impeach a witness on direct examination, the trial court should make a finding that the witness is hostile.” *United States v. Hughes*, 114 F.3d 1189, 1997 WL 271737 (6th Cir. 1997) (unpublished decision) (citing *United States v. Harris*, 523 F.2d 172, 174-75 (6th Cir. 1975)). “[T]here exist sound reasons for requiring a showing of hostility as a prerequisite to permitting the utilization of leading questions on direct examination except with respect to preliminary and uncontested matters.” *United States v. Bryant*, 461 F.2d 912, 918 (6th Cir. 1972).

In *Bryant*, the Court noted two competing views about the latitude that should be given to defense counsel in examining a witness whom he or she calls, which applies equally to government counsel. *Id.* at 916. The traditional view requires a showing of hostility on the “extrinsic” factors, such as the witness’s in-court testimony, or off-the-record facts before testimony that show the witness is on one side to such an extent that he is unlikely to give a true account of the facts. *Id.* The other view focuses on the “intrinsic” factors such as the relationship of the accused and the witness where a prerequisite showing of hostility is not always required. *Id.* at 916-17. The Court explained that the normal “vice” of leading questions on direct—that it suggests an answer to a witness who is presumably inclined to favor the questioner—is absent when the witness is not predisposed to favor the other side and accept the questioner’s suggestions. *Id.* at 918-19.

Although the exact bounds of when to declare a witness as hostile is squarely within the trial court’s discretion, the best practice suggest a party should make a request with the court and a supporting argument. *See, e.g., Pigott v. Battle Ground Acad.*, 3:11-CV-0764, 2013 WL 1775068 at *1 (M.D. Tenn. 2013) (“[W]hen Plaintiff actually calls the witnesses at trial, she may explain that they are hostile and ask our permission at that time to use leading questions”). Designation of a witness as hostile may be based on inconsistent statements. *See, e.g., United States v. Harris*, 523 F.2d 172, 174-75 (6th Cir. 1975) (finding trial court complied with *Bryant*, 461 F.2d at 918 by holding *voir dire* of government witnesses who recanted statements,

determined they were hostile, and permitted limited cross-examination and impeachment); *see also United States v. DeBose*, 410 F.2d 1273, 1276 (6th Cir. 1969) (permitting questioning of a hostile witness who gave testimony on the witness stand that was different from what she previously told the prosecution).

Co-conspirators with defendants are also subject to leading questions either as hostile witnesses or witnesses identified with an adverse party. In *United States v. Olivo*, the government's primary witness, a key co-conspirator, testified in a contradictory and confused fashion, expressed some difficulty understanding English, and said he was uncomfortable in the courtroom and hesitant to testify. 69 F.3d 1057, 1065 (10th Cir. 1995), *opinion supplemented on reh'g*, 80 F.3d 1466 (10th Cir. 1996). The court stated it was unclear from the record whether the witness was recalcitrant or just forgetful, but found no abuse of discretion for the court to recognize the witness as hostile at the government's request. *Id.*

Evasiveness is also a valid reason to allow leading questions of a hostile witness. *See, e.g., United States v. Mora-Higuera*, 269 F.3d 905, 912 (8th Cir. 2001) (finding no error in drug conspiracy case for allowing government counsel to ask leading questions of its witness when the witness "became evasive and unclear about the types of drugs involved in the conspiracy"). Forgetfulness is another significant basis to treat a witness as hostile. *See, e.g., United States v. Meza-Urtado*, 351 F.3d 301, 303 (7th Cir. 2003) (noting that witness "became conveniently 'forgetful' despite his agreement to help the government").

Statements of Co-Conspirators

Statements of co-conspirators are admissible against any defendant who is a member of the conspiracy where such statements are made during the course of, and in furtherance of, the conspiracy. Fed.R.Evid. 801(d)(2)(E). The court must find, by a preponderance of evidence, that there was a conspiracy involving the declarant and the non-offering party and that the statement was made during the course of, and in furtherance of, the conspiracy. *Bourjaily v. United States*, 483 U.S. 171 (1987). The co-conspirator's statement itself, sought to be admitted, may be used to establish these foundational elements. *Id.* The test "only requires that the proponent of the testimony show by a preponderance of the evidence that some conspiracy existed, not necessarily the one charged." *United States v. Bonds*, 12 F.3d 540, 573 (6th Cir. 1993).

In fact, it is clear that Rule 801(d)(2)(E) makes admissible statements in furtherance of a conspiracy even if the conspiracy relating to the statements sought to be introduced is different from the conspiracy in the indictment and at issue in the trial. See, e.g., *United States v. Bonds*, 12 F.3d 540, 573 (6th Cir. 1993); *United States v. Horton*, 847 F.2d 313, 323-24 (6th Cir. 1988).

As to the order of proof, the Sixth Circuit in *United States v. Vinson*, 606 F.2d 149 (6th Cir. 1979) recognized that the trial court has considerable discretion in determining which of several procedures may be utilized. The court approved the method used by the lower court in admitting the "hearsay statements subject to later demonstration of their admissibility by a preponderance of the evidence." *Id.* at 153. In deciding whether statements are made in furtherance of the

conspiracy, the Court is not bound by the rules of evidence, except those relating to privileges. *Bourjaily*, 483 U.S. at 177-78 (citing Fed.R.Evid. 104(a)). Thus, the court may consider the hearsay statements themselves in determining their admissibility. *Id.* It is also well established in the Sixth Circuit that a pretrial hearing concerning the admissibility of the co-conspirator statements is not required. *Vinson*, 606 F.2d at 152 (noting criticism of such hearings “as burdensome, time-consuming and uneconomic”); *see United States v. Boykins*, 915 F.2d 1573, 1990 WL 143559, at *7 (6th Cir. 1990).

It is not necessary that the person who offers testimony about the out-of-court statement have been a member of the conspiracy. *United States v. D'Antoni*, 874 F.2d 1214, 1217 (7th Cir. 1989). “A statement is ‘in furtherance of’ a conspiracy if it is intended to promote the objectives of the conspiracy.” *United States v. Clark*, 18 F.3d 1337, 1342 (6th Cir. 1994). “Statements which prompt a listener to act in a manner that facilitates the carrying out of the conspiracy are admissible under (d)(2)(E).” *United States v. Jerkins*, 871 F.2d 598, 606 (6th Cir. 1989). Statements that “identify participants and their roles in the conspiracy” also qualify as statements made in furtherance of the conspiracy. *Clark*, 18 F.3d at 1342. Statements made to generate confidence in a plan, and even boasting, are admissible as co-conspirator statements. *United States v. Santiago*, 837 F.2d 1545 (11th Cir. 1988).

It is not necessary that the declarant/co-conspirator be indicted for a co-conspirator statement to be admissible. *United States v. Williams*, 989 F.2d 1061, 1067 (9th Cir. 1993). Nor is it necessary that the statement be made to

another member of the conspiracy. *Id.* at 1068. The existence of the particular conspiracy charged in the indictment is not necessary for admission of co-conspirator statements under Rule 801(d)(2)(E); in fact it is not necessary that a conspiracy be charged at all. *United States v. Dworken*, 855 F.2d 12 (1st Cir. 1988).

On appeal, “[w]here the admissibility is a close call, the trial judge’s findings should generally remain undisturbed.” *United States v. Clark*, 18 F.3d 1337, 1342 (6th Cir. 1994).

“It could be argued that any statement by a coconspirator, made while he is a member of the conspiracy, that concerns the conspiracy and has some informational content is in furtherance of it.” *United States v. Pallais*, 921 F.2d 684, 688 (7th Cir. 1990).

The exchange of information is the lifeblood of a conspiracy, as it is of any cooperative activity, legal or illegal. Even commenting on a failed operation is in furtherance of the conspiracy because people learn from their mistakes.

Id. at 688.

Statements that otherwise meet the standards for admissibility of co-conspirator statements may not be excluded on the grounds that they were recorded by an individual who was cooperating with the government at the time. *United States v. Wright*, 343 F.3d 849 (6th Cir. 2003).

The Defendants Cannot Use Rule 801(d)(2)(E) to Admit Hearsay

It is clear that a criminal defendant cannot use Rule 801(d)(2)(E) to seek admission of exculpatory hearsay statements made by conspirators. This is because in order for Rule 801(d)(2)(E) to apply, the statement must be “offered against a party” and the statement must have been made by a co-conspirator of that party. As a result, since the government cannot be part of a conspiracy, a criminal defendant cannot use Rule 801(d)(2)(E) to admit hearsay statements. *United States v. Maliszewski*, 161 F.3d 992, 1011 (6th Cir. 1998) (“Here, the government was the party against whom the statement was offered, and we feel confident that [the criminal defendant] does not mean to suggest that the government was a member of the conspiracy. That fact precludes admission.”); *United States v. Briggs*, 27 F. App’x 547, 551-52 (6th Cir. 2001).

Statements Made in Furtherance of the Conspiracy

Rule 801(d)(2)(E) explicitly says statements need be “in furtherance of the conspiracy,” not that they “further the conspiracy.” It is enough that they be intended to promote the conspiratorial objectives. *United States v. Hamilton*, 689 F.2d 1262, 1270 (6th Cir. 1982). The following are some examples of facts which justify the use of Rule 801(d)(2)(E):

Statements that serve to provide reassurance, serve to maintain trust and cohesiveness among the coconspirators or inform each other of the current status of the conspiracy. *United States v. Rios*, 842 F.2d 868, 874 (6th Cir. 1988) (collecting cases).

“[E]ven if not every past event discussed directly involved the . . . group’s activities,” the conversation is admissible if “the overall effect of the conversations . . . was to solidify and facilitate the conspiracy.” *United States v. Leisure*, 844 F.2d 1347, 1361-62 (8th Cir. 1988).

Statements made to keep coconspirators advised as to the activities, status, or progress of the conspiracy. *United States v. Herrero*, 893 F.2d 1512, 1528 (7th Cir. 1990).

Statements designed to collect money. *United States v. Rios*, 842 F.2d 868, 874 (6th Cir. 1988).

Background information as to a coconspirator’s initial involvement. *United States v. Salerno*, 868 F.2d 524, 536-37 (2d Cir. 1989).

Statements part of the information flow between coconspirators intended to help each perform his role. *United States v. Herrero*, 893 F.2d 1512, 1527-28 (7th Cir. 1990).

Statements to recruit potential coconspirators. *United States v. Herrero*, 893 F.2d 1512, 1528 (7th Cir. 1990).

Statements to encourage continued participation. *United States v. Lujan*, 936 F.2d 406, 411 (9th Cir. 1991).

Statements made to prompt the listener to respond in a way that facilitates the conspiracy. *United States v. Long*, 917 F.2d 691, 702 (2d Cir. 1990).

Statements identifying other conspirators and their roles. *United States v. Hitow*, 889 F.2d 1573, 1581 (6th Cir. 1989) (collecting cases).

Commenting on a failed operation. “Even commenting on a failed operation is in furtherance of the conspiracy, because people learn from their mistakes,” because “it helps to establish, communicate, and thus confirm the lines of command in the organization.” *United States v. Pallais*, 921 F.2d 684, 688 (7th Cir. 1990).

Hearsay Exceptions – Fed.R.Evid. 803(1) & (3)

George Stanton, the chief of staff for Trustee Alberta Tinsley Talabi, was present at the September 20, 2007 meeting of the Police and Fire Retirement System when the controversial vote on the ICG-Leaseback deal took place. Talabi made a motion to approve an investment that was favorable for Robert Shumake, the investment sponsor. It passed. The vote was six to four. Before the meeting was adjourned for the day, Talabi left the boardroom. According to the minutes of the meeting, it was adjourned at 1:50 p.m. After the adjournment, defendant Jeffrey Beasley informed the chairman that Talabi requested that the meeting be re-opened because she wanted to change her motion. She then re-entered the boardroom, and the meeting was reopened at 1:55 p.m. Talabi then amended her motion to make the investment even more favorable for Shumake. This motion also passed, with the same split in the votes. When Talabi re-entered the boardroom, before she amended her motion, she had a brief conversation with Stanton. Talabi told Stanton that Beasley wanted her to make the change in the fee structure.

Although the statement by Talabi to Stanton is admissible under Rule 801(d)(2)(E), it also is admissible as a present sense impression. Fed. R. Evid. 803(1) defines a present sense impression as one of the exceptions to the hearsay rule that applies, whether or not the declarant is available as a witness. That rule states, “Present Sense Impression. A statement describing or explaining an event or

condition, made while or immediately after the declarant perceived it.” This hearsay exception was properly used to admit a 911 call in *United States v. Davis*, 577 F.3d 660, 668 (6th Cir. 2009). In that case, the defendant was convicted of possession of a firearm by a felon. In the 911 call, the declarant reported that she had seen the defendant with guns five minutes earlier. At trial, she testified that the lapse of time between seeing the defendant with the firearm and the call was 30 seconds to a minute. The Court held that the call was admissible as a present sense impression whether the interval of time was the shorter version or five minutes as she had stated during the call. *Id.* at 668, n.5. The Court stated, “This 911 call, made ‘immediately []after’ witnessing the described event, is not distinguishable from one that was contemporaneous with the event itself. It meets the definition of a present sense impression under Rule 803(1).” *Id.* at 668.

With circumstances similar to those in this case, the Eighth Circuit found the out of court statement admissible. *United States v. Dolan*, 120 F.3d 856, 869 (8th Cir. 1997). In that case, the witness testified about a statement made by the declarant after he met with the defendant, who was charged with conspiracy to commit bankruptcy fraud by hiding the assets of the declarant. The witness, who was the office manager for the declarant, testified that the declarant told her that he “had [the defendant] by the balls,” *id.* at 869, shortly after a meeting during which the declarant had paid the defendant \$50,000. The Court held that the statement was admissible, both as a present sense impression, Rule 801(1) and as a “statement

showing [the declarant's] then existing state of mind indicating a plan, motive, and design concerning his transactions and relationship with [the defendant]. *See Fed.R.Evid. 803(3).*" *Id.* at 869.

Talabi's statement to Stanton likewise falls within the scope of either Rule 801(1) or Rule 801(3), or both. She explained that she was changing her vote at the direction of Beasley, thus indicating her motive, intent, or plan. The statement was made within minutes of the Beasley instruction and is therefore admissible as a present sense impression.

Use of Transcripts By the Jury During Deliberations

The decision of whether to allow a jury to use transcripts of recorded statements during deliberations as an aid is left to the discretion of the court. *United States v. West*, 948 F.2d 1042, 1044 (6th Cir. 1991). In *United States v. Jacob*, 377 F.3d 573, 582 (6th Cir. 2004), the Sixth Circuit upheld a district court's decision "permitting the jury to use a transcript during the trial and deliberations." *See United States v. Elder*, 90 F.3d 1110, 1129-30 (6th Cir. 1996) ("Once admitted, transcripts may be used by the jury during the playing of tape recordings at trial and during jury deliberations after the case has been submitted."); *United States v. Vigi*, 363 F. Supp. 314, 318 (E.D. Mich. 1973) ("It is well established that it is not an abuse of discretion to allow the jury to retain transcripts during the trial and their deliberations.").

The Court Can Instruct the Jury on State Statutes

In several instances, the jury will need to be instructed by the Court concerning the laws of the state of Michigan governing public pension systems and the fiduciary obligations of trustees. It is well established that it is entirely proper for the Court to instruct the jury on the content and nature of state statutes. *United States v. Dedman*, 527 F.3d 577, 586-87 (6th Cir. 2008). In *Dedman*, the court held that a district court is “entitled--and indeed required--to determine the applicable law.” *Id.* at 587. The jury is bound to accept the Court’s instructions concerning state statutes. *Id.* In proving the charge of honest services fraud in Count 1 of the indictment, the government must show a violation of state law. The Sixth Circuit in *Dedman* identified judicial instruction on state statutes needed to satisfy an element of a federal criminal offense as an example of an appropriate instance where the jury must be instructed concerning a state law. *Id.* at 588 n.3; see *United States v. Clements*, 588 F.2d 1030, 1037 (5th Cir. 1979) (“The determination of the applicable state law is a question of law to be determined by the court. A court may

properly take notice of a state law. The court properly instructed the jury on the applicable law.”) (cited in *Dedman*).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2014, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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